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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-6001

JOHN JOSEPH and BRYAN ROBERTS,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. _____

JOHN JOSEPH and BRYAN ROBERTS,
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v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, John Joseph and Bryan Roberts, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 22, 1975.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, dated September 22, 1975, and as yet unreported, is set forth in Appendix A hereto. The trial

court, the United States District Court for the Southern District of Texas, filed no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1975. No motion for rehearing was filed, and this petition is filed within the time prescribed by Rule 22(2) of this Court.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether evidence obtained by court approved telephone wiretaps should have been suppressed pursuant to 18 U.S.C. § 2518(10)(a)(ii) when the Court's order approving the wiretaps was insufficient on its face in that it identified as the official authorizing the wiretap application an "Acting" Assistant Attorney General whose authority had lapsed pursuant to the provisions of the Vacancies Act, 5 U.S.C. §§ 3345-3348.

2. Whether an independent bookmaker operating in Dallas or Austin may be found guilty (under 18 U.S.C. §§ 1955, 371) of operating, and conspiring to operate, a separate bookmaking venture located in Victoria, Texas solely because he booked gambling wagers placed by the operators of the Victoria Book and he quoted his "betting line" to the Victoria bookmaking venture, which made no use of that line.

3. Whether the evidence against Petitioners was sufficient to permit their conviction of operating, and conspiring to operate, a bookmaking venture in Victoria, Texas, in violation of 18 U.S.C. §§ 1955, 371.

STATUTES INVOLVED

The statutes involved are as follows:

Title 5, U.S. Code Sections 3345-3348 (the "Vacancies Act");
Title 28, U.S. Code Section 506;
Title 18, U.S. Code Section 371;
Title 18, U.S. Code Section 1955; and
Title 18, U.S. Code Sections 2510, 2516 and 2518.

These statutory provisions are set forth, in their entirety, in Appendix B hereto.

STATEMENT OF THE CASE

The Petitioners, John Joseph and Bryan Roberts, and four other defendants were convicted after a jury trial of conspiring to operate an illegal gambling business and of the substantive offense of operating an illegal gambling business, in violation of 18 U.S.C. §§ 371, 1955. The trial court, the United States District Court for the Southern District of Texas, had subject matter jurisdiction pursuant to 18 U.S.C. § 3231.

The Wiretap Issue

At trial the Prosecution's case rested almost wholly on the transcripts and recordings of telephone conversations intercepted over a two-week period by FBI wiretaps and on the interpretations of the intercepted conversations made by the Prosecution's witnesses.

The wiretaps were instituted after obtaining district court authorization under the provisions of 18 U.S.C. §§ 2510-2520. However, neither the Government's application nor the court's order approving the wiretaps recited that the wiretap had been authorized by the Attorney General or an Assistant Attorney General specially

designated by the Attorney General, as required by 18 U.S.C. §§ 2516, 2518. Instead, both the application and order indicated that the authorizing official was "the Acting Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Henry E. Peterson."

As the application and order indicate, Mr. Peterson had not yet been appointed an Assistant Attorney General; he was merely a Deputy Assistant Attorney General who, since the resignation of Will Wilson, had been "acting" as the Assistant Attorney General in charge of the Criminal Division. But, as the Fifth Circuit concluded below, Mr. Peterson's authority to hold the office of Acting Assistant Attorney General had lapsed pursuant to the provisions of the Vacancies Act, 5 U.S.C. §§ 3345-3348.[1] While apparently conceding that Mr. Peterson had no authority to authorize a wiretap, the Fifth Circuit refused to hold that the wiretap evidence should have been suppressed pursuant to 18 U.S.C. § 2518(10)(a)(ii) on the grounds that the Court's order of authorization or approval was insufficient on its face. The Fifth Circuit held that it was sufficient that the wiretap application was personally approved by Attorney General John Mitchell, a fact established by the affidavits of Mitchell and Peterson, which the defendants—though skeptical—were unable to controvert. Thus the Fifth Circuit affirmed the trial court's refusal to suppress the wiretap evidence

1. Mr. Peterson's "acting" authority under 5 U.S.C. §3345 was limited to 30 days after the October 15, 1971 resignation of Will Wilson, as provided by 5 U.S.C. §3348. Thus Mr. Peterson's authority lapsed prior to November 29, 1971, and December 1, 1971, the dates of the wiretap application and order. He was not appointed Assistant Attorney General until January 11, 1972; the Senate confirmed the appointment on February 3, 1972.

on grounds of the facial insufficiency of the order authorizing the wiretaps.

The Evidence Relevant to the Petitioners

The uncontroverted evidence at trial established that four men operated a sports bookmaking establishment in Victoria, Texas ("the Victoria Book"). According to the Fifth Circuit's opinion below, a fifth person in Victoria acted as an agent for the Victoria Book because he relayed wagers placed by patrons of his pool hall. The evidence further showed that Petitioner Joseph operated a one-man sports book in Austin and that Petitioner Roberts operated a separate, independent sports book in Dallas. The Prosecution never contended that either of the Petitioners had any ownership interest or direct role in the separate operations of the Victoria Book.

At trial and before the Fifth Circuit the Prosecution relied on a single theory to establish the Petitioners' guilt on both the conspiracy and substantive counts: the Prosecution contended that each of the Petitioners (acting independently of one another) provided the Victoria Book with "the line" (i.e. the handicap or point spread) on football games and in return the Victoria Book "balanced its books" by making "layoff" or reinsurance bets with the Petitioners.[2] In support of this theory the Prosecution

2. "Balancing the books" refers to the self-protective technique which a bookmaker may, if he desires, utilize when he receives more bets on one side of a contest than the other. He may balance his books by making a "layoff bet," which is a bet placed on the more popular side of the contest in the amount by which the wagers on the more popular side exceed the less popular side. By placing such a layoff bet with someone else, the bookmaker eliminates any risk on the outcome of the sporting event and still profits in the amount of the 10% charge ("juice") on losing bets.

introduced intercepted telephone conversation showing that the Victoria Book placed some bets with each Petitioner and that each Petitioner quoted his line to the Victoria Book. To establish its "line" for "layoff" theory against Petitioners, the Prosecution relied on the allegedly expert testimony of an FBI agent. This agent testified that, while he was not familiar with bookmaking in Texas, all bookmakers whom he was aware of attempt to balance their books and that all bets by bookmakers are layoffs. Thus he concluded that the bets placed with the Petitioners by the Victoria Book were lay-off wagers. The agent further testified that the Victoria Book and the Petitioners "exchanged line information," though he did not testify that the Victoria Book used or followed either of the different lines used by the Petitioners.

Petitioner Joseph testified at trial and totally disproved the Prosecution's "line" for "layoff" theory. Using the approximately 2,500 page wiretap transcript of all wagers handled by the Victoria Book, this Petitioner completely reconstructed and tabulated the books of the Victoria operation. From these exhibits it was possible to determine the precise state of balance or imbalance of the Victoria Book at any given time, as well as the amount actually won or lost on each sporting event and the amount of juice earned. Each bet placed by the Victoria Book could thus be examined to determine whether it was placed for the purpose of balancing the book (a layoff bet) or, on the other hand, for the purpose of increasing the book's gamble or risk on the outcome (a "gambling bet"). At trial each of these exhibits was examined and analyzed by Petitioner Joseph to determine the nature of each bet placed by the Victoria Book, and it was conclusively proved that not a single lay-off bet was placed

from Victoria with the Petitioners. To the contrary, the Victoria Book consistently "pressed" its bets, increasing its gamble on the outcome of the sporting events. It was further shown that the Victoria Book lost substantial sums on its operations during the period covered by the wiretap transcripts. Contrary to the Prosecution's theory, it was established that the Victoria Book was a "gambling-type" operation and not a "juice" or "balanced book" operation.

Petitioner Joseph introduced additional, similar exhibits to disprove the Prosecution's contentions that he or the other bookmaker defendants supplied the Victoria Book's "line." These exhibits summarized in chronological order each quotation of a line by or to the Victoria Book; they showed the line quoted, the time it was quoted, and the person quoting the line. On examination of these exhibits, it was proven that the line used by the Victoria Book was consistently quite different from, and antedated, the line quoted by Petitioner Joseph or Petitioner Roberts. The Victoria Book apparently did not pay any attention to the Petitioners' lines, except in placing bets with the Petitioners.

The Prosecution never seriously challenged the accuracy and integrity of Petitioner Joseph's exhibits or his interpretation of them. Thus it was proved that the Petitioners provided no essential or necessary function for the Victoria Book; the Victoria Book was nothing more than a wagering customer of the Petitioners' separate books.

The Petitioners appealed to the Fifth Circuit on the grounds, inter alia, that the evidence was insufficient to support their conviction, especially in light of Petitioner

Joseph's testimony and exhibits. In its brief and argument before the Fifth Circuit the Prosecution continued to rely solely on its "line" for "layoff" theory as grounds for sustaining the Petitioners' convictions, arguing that the Prosecution's expert testimony sufficiently supported the verdicts of guilt.

The Fifth Circuit, in its opinion below, did not expressly decide whether the evidence was sufficient to support the Prosecution's contentions that the Victoria Book got its line from one of the Petitioners and made layoff bets to the Petitioners. The opinion notes that Petitioner Joseph's reconstruction and tabulation of the wiretapped transactions "makes it seem unlikely that the Victoria books were balanced" and elsewhere concedes that Petitioners Joseph and Roberts may not have had a layoff relationship with the Victoria Book. Similarly, regarding the line, the Fifth Circuit found only that "[l]ine and other gambling information was exchanged," and further noted that "[g]enerally they [the Petitioners and another defendant] were not the Victoria bookmakers' only source of 'line'." Nonetheless, the Fifth Circuit affirmed the judgments of conviction on a novel theory that was never relied on by the Prosecution in this case or - - insofar as Petitioners are aware - - any other case. It was found that the Petitioners were bookmakers, that they exchanged line and gambling information with the Victoria Book, and that they provided a means by which the Victoria Book could either decrease *or increase* their risk (i.e. layoff *or gamble*) on the outcome of contests. These facts alone were held sufficient to convict Petitioners of operating or conducting the Victoria Book and of conspiracy to operate the Victoria Book, in violation of 18 U.S.C. §§ 1955, 371.

Reasons for Granting the Writ

1. The refusal of the courts below to suppress the wiretap evidence is contrary to the reasoning of this Court's decisions in *United States v. Giordano*, 416 U.S. 505 (1974), and *United States v. Chavez*, 416 U.S. 562 (1974).

The *Giordano* decision establishes that only the Attorney General or one of the nine Assistant Attorneys General provided for in 28 U.S.C. § 506, all of whom are appointed by the President and confirmed by the Senate, may authorize a wiretap application under 18 U.S.C. §§ 2510-2520. Mr. Henry Peterson held none of these positions at the time of the wiretap proceedings in this case. Moreover, as the Fifth Circuit noted, any temporary authority for Mr. Peterson to act as an Assistant Attorney General pursuant to the Vacancies Act, 5 U.S.C. § 3348, had lapsed. Therefore, Mr. Peterson had no power or right to authorize the wiretap application in the present case, and the court's order approving the wiretaps — unlike the order in the *Chavez* case — was insufficient on its face insofar as it recited that Henry Peterson, "Acting Assistant Attorney General" had authorized the application. It is a statutory requirement that the court order approving a wiretap recite the identity of the person authorizing the application. 18 U.S.C. § 2518 (4)(d).

The courts below refused to suppress the wiretap evidence despite the provisions of 18 U.S.C. § 2518(10)(a)(ii), which mandate suppression when the order of authorization is "insufficient on its face" and despite the implication in *Chavez* that facial insufficiency of the Court's order always requires suppression.

In any event the Fifth Circuit has committed the error in statutory construction that this Court was so careful to avoid in *Giordano* and *Chavez*. In those key decisions the Court held that subsection (i) ["unlawful interception"] of the suppression provisions, Section 2518(10)(a), does not mandate suppression for *every* failure to comply fully with a requirement of the wiretap statute—otherwise the suppression provisions of Subsections (ii) ["facial insufficiency"] and (iii) ["failure to intercept in conformity with authorization order"] would become meaningless. The Court concluded that subsection (i) must be limited in application to fundamental violations of the Statutory scheme or to constitutional violations. On the other hand, the Court found that "paragraphs (ii) and (iii) must be deemed to provide suppression for failure to observe some statutory requirements that would not render interceptions unlawful under paragraph (i)." *United States v. Giordano*, supra, 416 U.S. at 527. Thus the Court was able to give content to all three of the suppression provisions.

The Fifth Circuit, however, has fallen into the error of interpreting subsection (ii) as requiring suppression only when the wiretap evidence would be suppressed as unlawful under subsection (i). Thus subsection (ii) has been drained of the independent content that this Court gave it in *Chavez* and *Giordano* and has been rendered redundant and meaningless.

The Court below rejected the Petitioner's "facial insufficiency" suppression argument on the authority of the opinion in *United States v. Robertson*, 504 F.2d 289 reh. en banc denied, 506 F.2d 1056 (1975) (5th Cir. 1974). Like *Chavez*, *Robertson* dealt with the issue of suppression pursuant to subparagraph (i) ["unlawful inter-

ception"]. The Court was faced with the argument that the wiretap application, *not order*, misidentified Acting Assistant Attorney General Peterson instead of the Attorney General, as the authorizing official. No challenge was made as to the facial sufficiency of the wiretap *order*. Therefore, as in *Chavez*, subparagraph (i) was the only conceivable basis of suppression, and on the direct authority of *Chavez*, it was held that the personal, though undisclosed, authorization of the wiretap application by the Attorney General was sufficient to render the wiretap evidence not "unlawfully intercepted" within the meaning of subparagraph (i).

The Fifth Circuit in the present case held that the *Robertson* case directly controlled and disposed of the Petitioner's argument that the wiretap order was facially insufficient; since the Attorney General actually approved the application, the evidence should not be suppressed as facially insufficient. Under the Fifth Circuit's reasoning and its reliance on *Robertson*, there could never be suppression on grounds of facial insufficiency of the court order under (ii) except when suppression would also occur under (i) for "unlawful interception," thus rendering (ii) totally redundant. In depriving subsection (ii) of its clear and independent content, the Fifth Circuit's decision below directly conflicts with this Court's *Chavez* and *Giordano* decisions.

2. The wiretap suppression issue decided below presents an important question of federal law that has not been, but should be, settled by this court. It is essential that this Court clarify the circumstances under which wiretap evidence should be suppressed on grounds that the order pursuant to which it was obtained was "facially insufficient" under 18 U.S.C. § 2518(10)(a)(ii).

If this question is not decided, the lower courts will likely continue to be flooded with appeals concerning the circumstances under which suppression is required; government investigatory agencies will not be fully informed of the standards to which they must conform in order to obtain admissible evidence, with the distinct possibility that evidence will be suppressed in important prosecutions because of mistakes in obtaining court approval of wiretaps; and finally, the Congressional intent to impose safeguards and limitations on the extraordinary and sensitive grant of wiretap authority may be frustrated by the interpretation placed on the suppression provisions of 18 U.S.C. § 2518(10)(a)(ii)* by the lower courts.

3. The wiretap issue in this case may be controlled by *Vigi v. United States,* No. 75-101, Petition for Certiorari filed 7/17/75, should review be granted therein. The opinion of the Sixth Circuit in *Vigi* is reported at 515 F.2d 290 (1975).

4. In this case the Fifth Circuit decided important questions of federal law that have not been settled by this Court concerning the interpretation of 18 U.S.C. §1955, proscribing certain illegal gambling businesses and concerning the interpretation of the conspiracy statute, 18 U.S.C. §371, as it applies to conspiracies to violate 18 U.S.C. §1955. It is particularly important that this Court provide a definitive explanation of the conduct which constitutes a violation of Section 1955 and of the conduct which constitutes an illegal conspiracy to violate Section 1955 in order to prevent the frustration of the Congressional intent underlying this relatively recent (1970), but important and much-used, legislation.

As many lower courts have recognized, the legislative history underlyiny Section 1955 unequivocally indicates that this crime was intended to apply only to large-scale gambling operations; Congress sought to confine federal attention solely to gambling operations having national importance and not to supplant local law enforcement efforts against smaller gambling operations. E.g. *United States v. Bridges,* 493 F.2d 918 (5th Cir. 1974); *United States v. Pacheco,* 489 F.2d 554 (5th Cir. 1974); *United States v. Thomas,* 508 F.2d 1200 (8th Cir. 1975). For example, the House committee report accompanying this legislation provides the following:

> The intent of section 1511 and section 1955, below, is not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions. It is anticipated that cases in which their standards can be met will ordinarily involve business-type gambling operations of considerably greater magnitude than simply meet the minimum definitions.[3]

While it has received widespread judicial recognition,[4] the Prosecution's legal theory in this case that separate bookmakers become joint participants in the *same* gambling business when they exchange the line information and lay-off bets is, Petitioners submit, inconsistent with the congressional intent of Section 1955, especially when joined with the factual theory of the Prosecution's expert

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3. H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 53 (1970), 2 U.S. Code Cong. & Admin. News 1970, 4007, at 4029. *Accord,* e.g., S. Rep. No. 91-617, 91st Cong., 2d Sess. 73 (1969); 116 Cong. Rec. 603 (1970).

4. *E.g.,* United States v. McHale, 495 F.2d 15 (7th Cir. 1974); United States v. Sacco, 491 F.2d 995 (9th Cir. 1974); United States v. Ceraso, 467 F.2d 653 (3d Cir. 1972).

witnesses that all bookmakers necessarily have interconnecting financial arrangement, each providing essential line and layoff functions for one another. If this line of reasoning is accepted, it is difficult to escape the conclusion—clearly never intended by Congress—that all bookmakers are engaged in one mammoth gambling business in violation of Section 1955, as well as one big conspiracy to violate Section 1955. See *United States v. Schaefer,* 510 F.2d 1307, 1314-18 (dissenting opinion).

The Fifth Circuit's decision below, however, goes much further. The panel was apparently unwilling to find—in face of overwhelming evidence to the contrary—that the evidence was sufficient to show that the Victoria Book made layoff bets to the Petitioners or that the Petitioners provided essential line information to the Victoria Book. The convictions were sustained solely on the basis that the Petitioners were bookmakers, that the Victoria Book was a customer placing gambling bets with each of the Petitioners, and that gambling and line information was passed.

In addition to undermining congressional intent, the Fifth Circuit's theory of guilt, which was never advanced by the Prosecution, is inconsistent with any reasonable reading of the language of Section 1955. It is difficult to understand how either Petitioner came to "conduct, finance, manage, supervise, direct or own all or part" of the Victoria Book merely by accepting gambling, non-layoff wagers from the Victoria bookmakers and quoting a line to the Victoria Book that was not used in the Victoria operation. It is further difficult to understand, given only these facts, how the Petitioners and the Victoria Book were engaged in a single, common enterprise, as a

reasonable reading of Section 1955 requires. The business interests of the Petitioners and the Victoria Book were clearly antagonistic; the Victoria Book hoped to win money from the Petitioners and were expected to pay if they did not.

For essentially the same reasons, the decision is contrary to prevailing conspiracy doctrine applied in other, though analogous, contexts. It is elemental that joinder in a common goal or uniform purpose is an essential element of conspiracy. For example, the so-called "buyer-seller" line of case establishes that the sale of goods or even contraband with knowledge of an intended illegal use by the buyer will not support a conspiracy conviction of the two parties because these facts are equally consistent with the theory that each was acting solely for his own benefit, i.e. there is no *joint* objective. E.g., *Johns v. United States,* 195 F.2d 77 (5th Cir. 1952); *United States v. Falcone,* 109 F.2d 579 (2d Cir.), aff'd, 311 U.S. 205 (1940). These cases seemingly require the reversal of Petitioners' conspiracy convictions. But in any event, it is important that this Court decide the application of 18 U.S.C. §371 to alleged conspiracies to operate illegal gambling businesses in violation of Section 1955.

5. The Fifth Circuit's decision below interpreting Section 1955 and the offense of conspiracy to violate Section 1955 conflicts with the decisions of the Eighth Circuit on the same questions. See, *United States v. Thomas,* 508 F.2d 1200 (8th Cir. 1975); *United States v. Bohn,* 508 F.2d 1145 (8th Cir. 1975); *United States v. Schaefer,* 510 F.2d 1307 (8th Cir. 1975). Despite a vigorous and well-reasoned dissent in *Schaefer* (see 510 F.2d at 1314-18) adopted by another member of the court in *Thomas*

(see 508 F.2d at 1207), the Eighth Circuit has accepted the Government's theory that separate bookmakers can be tied together to find conspiracy and substantive violations of Section 1955 if they make layoff bets with one another and exchange line information. But a careful reading of these cases demonstrates that the proof of layoff betting is the prerequisite to a finding of guilt. Moreover, the *Thomas* opinion indicates (508 F.2d at 1206) that more than isolated and casual layoff bets and an occasional exchange of line information are required in order to establish guilt.

The Fifth Circuit's holding below that Petitioners could be found guilty of operating and conspiring to operate the Victoria Book even in the absence of layoff betting is contrary to the Eighth Circuit's interpretation of the same statutory provisions. This Court should resolve this conflict between the Courts of Appeals.

CONCLUSION

For the reasons set forth above, Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Service by mail, in like manner, was further made on the other three parties in the Court below, who may be deemed Respondents pursuant to Rule 21(4), as follows: Mr. Edward J. Ganem (attorney for Victor Ganem), Suite 306, First Victoria National Bank Bldg., Victoria, Texas 77901; Mr. Jack Paul Leon (attorney for Milton Kothman), 18th Floor, Milam Building, San Antonio, Texas 78205; and Mr. Arthur Lapham (attorney for Richard Dick), P.O. Drawer D, Victoria, Texas 77901.

DONALD SCOTT THOMAS, JR.

APPENDIX A

UNITED STATES of America, Plaintiff-Appellee,

v.

John JOSEPH, Bryan Roberts, Milton Kothman, Victor Ganem, Richard Dick, Defendants-Appellants.

NO. 74-1156.

United States Court of Appeals,
Fifth Circuit.

September 22, 1975.

Defendants were found guilty in the United States District Court for the Southern District of Texas at Victoria, Owen D. Cox, Jr., of operating an illegal gambling business, and of conspiracy. The defendants appealed. The Court of Appeals held that where Attorney General, rather than named official, in fact authorized application for wiretap order, order was not insufficient because it named, as Justice Department official authorizing the application, an acting Assistant Attorney General whose authority had lapsed pursuant to provision of Vacancies Act. Associate of bookmakers, who passed bets on to them and acted only as their disbursement agent, was, as an agent, to be counted in deciding whether at least five persons were conducting a gambling business. Persons who helped bookmakers by providing them with line and other gambling information, serving as means by which bookmakers could increase, decrease or eliminate their risk on particular event, were also to be counted.

Affirmed.

Appeals from the United States District Court for the Southern District of Texas.

Before RIVES, GODBOLD and GEE, Circuit Judges.

PER CURIAM:

[1] On February 2, 1973, a jury found the five defendants guilty of conspiracy to operate an illegal gambling business and of the substantive offense of operating an illegal gambling business (See 18 U.S.C. § 371 and § 1955.) The district court entered judgments of conviction on the jury's verdict. We discuss only two issues[1] on appeal: (1) whether an irregularity in the order authorizing recording of their telephone conversations rendered the recordings inadmissible in evidence, and (2) whether there was sufficient evidence to support the jury's verdicts. We affirm the judgments of conviction.

FACTS

Richard Dick and three other men, who were not tried with him, operated in Victoria, Texas, a gambling establishment (hereafter referred to as Victoria or Victoria bookmakers). They worked in a central place of business, accepting wagers—usually communicated by telephone—on high school, college and professional sporting events. Ganem operated a pool hall in Victoria

1. We have delayed decision of this appeal to await an en banc decision relating to a third issue. Appellant Ganem asserted that the recordings of his telephone conversations could not be admitted into evidence against him or the other appellants, because the application for the wiretap order failed to name him as a target of the interception. Since Ganem has not shown that his rights have been prejudiced by the failure to name him, his argument is foreclosed by the recent Fifth Circuit en banc decision in *United States v. Doolittle*, 5 Cir. 1975, 518 F.2d 500. Other issues raised have been considered but, in our opinion, do not merit discussion.

and acted as an agent for the Victoria bookmakers, relaying wagers placed by patrons of his pool hall and handling the necessary financial arrangements—collecting from losers and paying winners. Line[2] and other gambling information was exchanged by Victoria and three of the appellants who were professional gamblers living in other Texas cities (Joseph in Austin, Roberts in Ft. Worth, and Kothman in San Antonio). Generally, they were not the Victoria bookmakers' only source of "line." They and Victoria also placed bets with each other. Although the transcript of the wiretaps reveal that several of the appellants talked of some of those wagers as "balancing the books," [3] a reconstruction and tabulation of the telephone transactions makes it seem unlikely that the Victoria books were balanced. The record does reveal, however, that the Victoria bookmakers did use their bets with Joseph, Roberts and Kothman to increase or decrease their wagers on contests on which their

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2. A bookmaker's "line" is his price list—that is, the odds (or "points") he will give to individual bettors. The violations in the instant case took place during football season. A hypothetical example of the line on a Baylor-SMU football game would be Baylor +2½ points; that is, the gambler would be predicting that SMU would win the contest by 2½ points. A bettor who bet on Baylor would win if Baylor either won the game or lost by less than three points, and would lose if SMU won by three or more points.

3. "Balancing the books" is a term of gambling art which refers to the self-protective actions of a bookmaker who receives more bets on one side of a contest than on the other. He balances his books by placing a "layoff bet" with another gambler. This "layoff bet" would be for the excess of the dollars bet on the more popular side over the dollars bet on the less popular side. For example, a bookmaker accepting wagers on the Oklahoma-Texas football game might find himself with $40,000 wagered on Texas and $100,000 on Oklahoma. To balance his books, he would place with another bookmaker a bet of $60,000 on Oklahoma. His profit would come from the 10% surcharge ("juice") that bookmakers exact on losing bets; that is, a person who placed a $10 bet would receive $10 if he won, but would pay $11 if he lost.

customers' wagers were not sufficient for the yield which they desired.

AUTHORIZATION PROCEDURE

[2] The first issue is whether the wiretap order was insufficient on its face because it named, as the Justice Department official authorizing the wiretap application, an Acting Assistant Attorney General whose authority had lapsed pursuant to the provisions of the Vacancies Act, 5 U.S.C. § 3348. The appellants, in their briefs (Joseph's brief, pp. 29-31) and in oral argument, do not contest the government's statement that the Attorney General, rather than the named official in fact authorized the application. Under facts identical with the ones in the instant case, this Court in *United States v. Robertson*, 5 Cir. 1974, 504 F.2d 289, *reh. en banc denied*, 506 F.2d 1056, held that this particular defect did not make an order facially insufficient. However, the fact that the Acting Assistant Attorney General's authority had expired was presented to the *Robertson* court only in the petition for a rehearing en banc. The rationale of the *Robertson* decision was that "the congressional intent [to limit the use of wiretap] is satisfied when the head of the Justice Department personally reviews the proposed application and determines that the situation is appropriate for employing [the] extraordinary investigative measure [of wiretapping]." *Robertson, supra* at 292. That rationale applies to the instant situation.[4] We hold that *Robertson*

4. An argument can be made that the de facto officer doctrine would apply to this particular situation and that the Acting Assistant Attorney General's authority would be held not to have expired, despite the contrary provision of the Vacancies Act. *See* Annotation 71 A.L.R. 848 (1927); Comment, *Temporary Appointment Power*, 41 U. Chi. L. Rev. 146 (1973). *But see* Comment, *The De Facto Officer Doctrine*, 63 Colum. L. Rev. 909 (1963).

controls and that the recordings were admissible in evidence.

SUFFICIENCY OF THE EVIDENCE

The second issue is whether there was evidence sufficiency to support the jury's conclusion that at least five (5) persons conducted the Victoria bookmaking business and that each of the appellants helped conduct that business. A violation of 18 U.S.C. § 1955 occurs only where five or more persons conduct an illegal gambling business.[5]

[3-6] Appellants concede that there were four persons conducting the gambling business—Dick and his three associates who were not tried with him. We conclude that Dick and each of the other appellants helped conduct this business. Ganem was an associate of the bookmakers, passing on to them bets and acting as one of their disbursement agents. Agents, such as he, must be counted in deciding whether at least five persons are conducting a gambling business. *See United States v. Becker,* 2 Cir. 1972, 461 F.2d 230; *United States v. Riehl,* 3 Cir. 1972, 460 F.2d 454. Joseph, Roberts and Kothman helped the Victoria bookmakers by providing them with line and

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5. "(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

"(b) As used in this section—

"(1) 'illegal gambling business' means a gambling business which—

"(i) is a violation of the law of a State or political subdivision in which it is conducted;

"(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

"(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day."

18 U.S.C. § 1955(a) and (b).

other gambling information. They served, too, as a means by which the Victoria bookmakers could increase, decrease or eliminate their risk on a particular event. A person who performs a necessary function other than as a mere customer or bettor in the operation of illegal gambling "conducts an illegal gambling business." *United States v. Jones,* 9 Cir. 1974, 491 F.2d 1382, 1384.

> "The only exclusions intended by Congress were the individual player or bettor and not the professional bookmaker who also in the course of his business bets.
>
> "Thus Congress' intent was to include all those who participate in the operation of a gambling business, regardless [of] how minor their roles and whether or not they [are] labelled agents, runners, independent contractors or the like, and to exclude only customers of the business.' *United States v. Becker,* 461 F.2d 230, 232 (2d Cir. 1972). 'As the House Committee Report stated, the term "conducts" is broad enough to include both "high level bosses and street level employees." ' *United States v. Hunter,* 478 F.2d 1019, 1022 (7th Cir. 1973) (includes runners, telephone clerks, salesmen and a watchman as 'conducting' a gambling operation).
>
> "Certainly the layoff-bettor is a more obvious target of § 1955 than runners, salesmen, clerks, and watchmen."

United States v. McHale, 7 Cir. 1974, 495 F.2d 15, 18. While Joseph, Roberts and Kothman may not have been layoff bettors, they were more than individual players or bettors and consciously aided in the conduct of the Victoria bookmaking business. There is sufficient evidence to support the jury's verdict. The judgments of conviction are affirmed.

Affirmed.

APPENDIX B

STATUTES INVOLVED

Title 5, U.S. Code Sections 3345-3348 (the "Vacancies Act") provide as follows:

§ 3345. Details; to office of head of Executive or military department.

When the head of an Executive department or military department dies, resigns, or is sick or absent, his first assistant, unless otherwise directed by the President under section 3347 of this title, shall perform the duties of the office until a successor is appointed or the absence or sickness stops.

§ 3346. Details; to subordinate offices.

When an officer of a bureau of an Executive department or military department, whose appointment is not vested in the head of the department, dies, resigns, or is sick or absent, his first assistant, unless otherwise directed by the President under section 3347 of this title, shall perform the duties of the office until a successor is appointed or the absence or sickness stops.

§ 3347. Details; Presidential authority.

Instead of a detail under section 3345 or 3346 of this title, the President may direct the head of another Executive department or military department or another officer of an Executive department or military department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the office until a successor is appointed or the absence

or sickness stops. This section does not apply to a vacancy in the office of Attorney General.

§ 3348. Details; limited in time.

A vacancy caused by death or resignation may be filled temporarily under section 3345, 3346, or 3347 of this title for not more than 30 days.

Title 28, U.S. Code Section 506 provides as follows:

§ 506. Assistant Attorneys General.

The President shall appoint, by and with the advice and consent of the Senate, nine Assistant Attorneys General, who shall assist the Attorney General in the performance of his duties. (Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 612.)

Title 18, U.S. Code Section 371 provides as follows:

§ 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18, U.S. Code Section 1955 provides as follows:

§ 1955. Prohibition of illegal gambling businesses.

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $20,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, book making, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for

arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizures, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefits of any private shareholder, member, or employee of such organi-

zation except as compensation for actual expenses incurred by him in the conduct of such activity.

Title 18, U.S. Code Sections 2510, 2516 and 2518 provide as follows:

§ 2510. Definition.

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used

to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

§ 2516. Authorization for interception of wire or oral communications.

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections

2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following section of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of

stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnapping, and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery,

extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

§ 2518. Procedure for interception of wire or oral communications.

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried

and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the

judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobstrusively and with a minimum of interference with the service that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall

contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

> (a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic or organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and
>
> (b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is

made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for

inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-600

JOHN JOSEPH AND BRYAN ROBERTS, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 75-611

VICTOR GANEM AND RICHARD DICK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

All petitioners contend that evidence obtained from a court-approved wire interception should have been suppressed because the intercept order incorrectly stated that the application had been authorized by a specially-designated Acting Assistant Attorney General. Petitioner Ganem contends that evidence derived from the same wire interception should have been suppressed as to him because he was not named in the intercept application and order. Petitioners Joseph and Roberts contend that the evidence was insufficient to support their convictions.

After a jury trial in the United States District Court for the Southern District of Texas, petitioners were convicted of operating an illegal gambling business, in violation of 18 U.S.C. 1955, and of conspiracy to commit that offense, in violation of 18 U.S.C. 371. Each petitioner was fined $1,000. In addition, each was sentenced to imprisonment for two years on each count; the sentences were suspended, and each petitioner was placed on probation for five years. The court of appeals affirmed (Pet. No. 75-600 App. A).

The facts are set forth in the opinion of the court of appeals and may be summarized as follows. Petitioner Richard Dick, along with three other individuals who were not tried in the instant prosecution, operated a bookmaking business in Victoria, Texas. Dick and his partners used telephones located at a house-trailer and at one of their homes to solicit and accept wagers on the outcomes of high school, college, and professional athletic events. Petitioner Victor Ganem assisted them by soliciting wagers for them from the patrons of his pool hall in Victoria and by making the appropriate collections or pay-offs on those wagers. Petitioners John Joseph and Bryan Roberts, who conducted separate gambling operations in Austin and Dallas-Fort Worth respectively, traded "line" information[1] and exchanged "lay-off" bets [2] with the Victoria bookmakers.

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[1]A bookmaker's "line" is the handicap he gives his bettors on a given wager. For example, a line of "6 Harvard" on the Harvard-Yale football game means that those customers betting on Harvard will win their bets only if Harvard prevails by more than 6 points.

[2]One bookmaker customarily places a "lay-off" bet with another bookmaker when he has received substantially more bets on one side of a contest than on the other and desires to eliminate the risk of heavy loss. For example, if a bookmaker received bets of $100,000 on Harvard and only $40,000 on Yale in a Harvard-Yale game, he might place a lay-off bet of $60,000 on Harvard with another bookmaker in order to balance his books.

The evidence was derived largely from a court ordered electronic interception of the telephones used by petitioner Dick and his partners. The application for the order and the order authorizing the interception indicated that Acting Assistant Attorney General Henry Petersen had been specially designated by Attorney General John Mitchell pursuant to 18 U.S.C. 2516 to authorize the application (R.A. Pl. 202-212).[4] In fact, the Attorney General had personally approved the application request, and directed Petersen to issue the formal authorization (Gov't Supp. Br. 17-18).[5]

1. Petitioners contend (Pet. No. 75-600, p. 9; Pet. No. 75-611, pp. 9-10) that the evidence derived from the court-ordered wire interception should have been suppressed under 18 U.S.C. 2518(10)(a)(ii) because the order authorizing the interception was insufficient on its face. They argue that an Acting Assistant Attorney General does not possess the requisite statutory authority to authorize wire interception applications and that an intercept order identifying an Acting Assistant Attorney General as the person who authorized the application is therefore facially deficient. Petitioners Joseph and Roberts argue in the alternative that the order was insufficient on its face because Petersen's authority as Acting Assistant Attorney General had lapsed under the Vacancies Act, 5 U.S.C. 3348, at the time application was made to the district court. These deficiencies, they claim, require suppression of the evidence even though the application was in fact authorized by the Attorney General.

The transcripts of the interceptions indicate that the Victoria bookmakers placed lay-off bets with the Dallas-Fort Worth and Austin operations, although petitioners introduced evidence indicating that the Victoria books were not balanced during the period of the interceptions (Pet. No. 75-611 App. 13; Tr. 1332-1424).

[4]"R.A. Pl." refers to Record on Appeal, Pleadings Appendix.

[5]"Gov't Supp. Br." refers to the government's supplemental brief in the court below, which we are lodging herewith.

The same contention was made in *Vigi* v. *United States*, No. 75-101, certiorari denied October 20, 1975, and similarly does not warrant review here.[6] The order was not facially invalid, since an Acting Assistant Attorney General may lawfully be specially designated to authorize an application for an intercept order. Cf. *United States* v. *Pellicci*, 504 F.2d 1106 (C.A. 1), certiorari denied, 419 U.S. 1122.[7] But even assuming *arguendo* that the order here was facially insufficient, suppression would not be required. Since the Attorney General actually authorized the application at issue here, this case does not involve any "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures * * *." *United States* v. *Giordano*, 416 U.S. 505, 527. See also *United States* v. *Acon*, 513 F.2d 513, 516-519 (C.A. 3); *United States* v. *Robertson*, 504 F.2d 289, 291-292 (C.A. 5), certiorari denied, 421 U.S. 913. The court below thus correctly held (Pet. No. 75-600 App. 22) that "the congressional intent [to limit the use of wiretap] is satisfied when the head of the Justice Department personally reviews the proposed application" (quoting from *United States* v. *Robertson*, *supra*, 504 F.2d at 292).

2. Petitioners Joseph and Roberts contend that their involvement with the Victoria bookmakers as shown by the evidence did not constitute a conspiracy to violate 18 U.S.C. 1955. This contention was correctly rejected by the court below, on whose opinion we rely (Pet. No. 75-600 App. 23-24):

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[6]We are sending petitioners a copy of our Memorandum in *Vigi*.

[7]Petitioners Joseph and Roberts incorrectly assume that an allegation that Petersen was not in fact the Acting Assistant Attorney General because of the operation of 5 U.S.C. 3348 attacks the facial validity of the order. Instead, such an attack attempts to look behind the facial validity of the order to demonstrate its actual invalidity. See *United States* v. *Chavez*, 416 U.S. 562, 573-574.

> Joseph [and] Roberts * * * helped the Victoria bookmakers by providing them with line and other gambling information. They served, too, as a means by which the Victoria bookmakers could increase, decrease or eliminate their risk on a particular event. A person who performs a necessary function other than as a mere customer or bettor in the operation of illegal gambling "conducts an illegal gambling business." *United States* v. *Jones*, 9 Cir. 1974, 491 F.2d 1382, 1384.
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> > "The only exclusions intended by Congress were the individual player or bettor and not the professional bookmaker who also in the course of his business bets. * * * "
>
> *United States* v. *McHale*, 7 Cir. 1974, 495 F.2d 15, 18. While Joseph [and] Roberts * * * may not have been layoff bettors, they were more than individual players or bettors and consciously aided in the conduct of the Victoria bookmaking business.

3. Petitioner Ganem contends (Pet. No. 75-611, p. 7) that evidence derived from the wire interception should have been suppressed as to him because he was not named in the intercept application and order. The issue whether 18 U.S.C. 2518(1)(b)(iv) requires the identification in a telephone interception application of every person whom the government has probable cause to believe it will overhear participating in conversations relating to the specified illegal activity is pending before this Court in five other petitions for writs of certiorari: *United States* v. *Bernstein*, No. 74-1486; *United States* v. *Donovan*, No. 75-212; *Anderson* v. *United States*, No. 75-500; *Malloway* v. *United States*, No. 75-509; and *Doolittle* v. *United States*, No. 75-513. For the reasons stated in our petitions in *Bernstein* and *Donovan*,[8] we contend that the "person, if known" who is required by

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[8] We are sending petitioners a copy of those petitions.

Section 2518(1)(b)(iv) to be identified in the application for the intercept authorization is the person who leases or commonly uses the telephone being intercepted; that is, the primary target of the interception. Petitioner Ganem was a person who called the bookmakers on the intercepted telephones from an outside, nonintercepted phone; he was not a primary target of the investigation. In any event, as we further argue in *Bernstein* and *Donovan*, the failure to name an individual in the application and order does not warrant suppression as to him of the evidence derived from the interception, in the absence of any showing of prejudice or government bad faith, *United States* v. *Doolittle*, 507 F.2d 1368 (C.A. 5), affirmed, 518 F.2d 500 (*en banc*), petitions for certiorari pending, Nos. 75-500, 75-509, and 75-513. The court below followed *Doolittle* and accordingly found it unnecessary to consider whether there was in fact probable cause to identify petitioner Ganem (Pet. No. 75-611 App. 12, n.1).[9]

Since the conflict between the circuits in *Donovan*, *Bernstein* and *Doolittle* is presented in our *Donovan* and *Bernstein* petitions, this Court may wish to hold the *Ganem* petition, No. 75-611, until it has acted on those petitions. If, after such action, the existence *vel non* of

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[9]We think it is clear that the record does not support petitioner Ganem's claim that the government had probable cause to believe he would be overheard. The record discloses only that F.B.I. Agent Alfred Gunn once interviewed Ganem about his gambling activities in April 1967, more than four years prior to the government's application for the interception involved here (Tr. 326-330). Although Agent Gunn regularly checked the activities of petitioner Dick and his partners during the 1967-1971 period in an effort to detect federal gambling law violations, he did not conduct further interviews with petitioner Ganem. Even assuming the government knew in October 1971 that petitioner Ganem remained an active bookmaker, there was no evidence indicating government awareness of any connection between Ganem's current gambling activities and the bookmaking business operated by those named in the interception application.

probable cause to name petitioner Ganem in the application is relevant, the case should be remanded to the court of appeals for further development of the record. But since the petition of Joseph and Roberts raises no similar pending issues, it is respectfully submitted that the petition for a writ of certiorari in No. 75-600 should be denied. Similarly, since there is no such issue in No. 75-611 as to petitioner Dick, that petition should now be denied as to him.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

Petitioner Ganem claims (Pet. No. 75-611, p. 6) that Agent Gunn saw him in the company of the Victoria bookmakers at the bookmakers' office on February 13, 1970. Although Gunn apparantly did testify to petitioner's presence at the February 1970 meeting (Tr. 439), this was a misstatement. Gunn had earlier made clear that the individual seen at the meeting was Emil Ganem, one of petitioner's relatives, and not petitioner (Tr. 338-339). Later, in response to questioning from petitioner's attorney, Gunn reiterated that Emil Ganem, rather than Victor Ganem, had been present at the February meeting (Tr. 498).